Link to Final Agency Decision
7-1800-19059-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the License of Dawn Mundahl to Provide Family Child Care

FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Richard C. Luis on September 13, 2007, at the Health Services Building, Room 111, 525 Portland Avenue, Minneapolis, Minnesota. The hearing record closed upon the conclusion of the hearing on September 13, 2007.

Mary M. Lynch, Assistant Hennepin County Attorney, Administration Center, Suite 1210, 525 Portland Avenue, Minneapolis, Minnesota 55415, appeared on behalf of the Hennepin County Human Services Department (the County) and the Minnesota Department of Human Services (the Department or DHS). Dennis J. Dietzler, Attorney at Law, 6625 Lyndale Avenue S., Suite 426, Richfield, Minnesota 55423, appeared on behalf of the Licensee, Dawn Mundahl.

STATEMENT OF ISSUE

Should the Licensee's family child care license be revoked because she failed to comply with the terms of her conditional license by operating in violation of age distribution requirements, failing to provide access to the daycare premises, failing to comply with several safety requirements, and failed to provide appropriate records for children in care, all in violation of applicable statutes and rules?

The Administrative Law Judge concludes that adverse action against the license should be taken and that the record in this matter supports the sanction of revocation.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Dawn Mundahl, has provided licensed child care at her current location since November 1989.[1] She currently holds a Class C2 Group Family Day Care license to provide family child care at 7215 Clinton Avenue S., Richfield, Minnesota. A C2 Group Family Day Care license allows a total of twelve children in day care. Of the twelve children allowed, no more than ten children under school age

[1] Testimony of Gena Johnson. The Licensee provided licensed child care at her former residence for several years before moving to her current location. Testimony of Licensee.

are allowed, and no more than two of the ten may be infants (under one year of age) or toddlers (under 30 months of age). Of the two infants and toddlers, only one may be an infant.[2]

2. As a daycare provider, the Licensee is subject to inspection and relicensing visits. Gena Johnson, a Hennepin County licensing worker who handles renewal and compliance investigations of child care licenses, has had the Licensee as part of her caseload since 2004.[3]

3. On September 12, 2005, the County issued the Licensee a warning letter that her license renewal information had not been received.[4]

4. On October 12, 2005, Johnson made a relicensing visit to the Licensee's daycare premises. During that visit, Johnson observed four toddlers in the daycare, and several items of concern regarding sanitation. A correction order was issued regarding the violation of the age ratio rule and other conditions found noncompliant.[5] Several rooms in the daycare were inaccessible and the Licensee could not unlock them.[6]

5. Beginning on October 31, 2005, the County issued the Licensee renewals for one year, rather than the usual two years. This renewal schedule was initiated because of the Licensee's noncompliance with age ratios and required training.[7]

6. On two subsequent visits in November, 2005, the Licensee refused to allow Johnson or Judy Ames (another County inspector) access to parts of the daycare. During this period, the Licensee failed to correct several noted violations, including failure to complete the required six hours of training. The Licensee complained that the County had not reminded her about the training requirement until the correction order was issued. Ames reminded the Licensee that the six hours per year training requirement was not new.[8]

7. On January 25, 2006, the County recommended to the Department that the Licensee have her family child care license revoked.[9] The Department issued an Order of Revocation on July 20, 2006, which the Licensee appealed.[10] On December 8, 2008, the parties entered into a Settlement Agreement in which the Licensee acknowledged that she would be subject to monthly, unannounced drop-in visits. The Licensee was placed on conditional status for one year and she agreed to:

a. fully comply with all applicable Minnesota laws and rules;

b. comply with the ratio and capacity requirements;

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[2] Ex. 19; Minn. Stat. § 245A.02, subd. 19; Minn. R. 9502.0367 C. (2).
[3] Testimony of Gena Johnson.
[4] Ex. 24.
[5] Ex. 22.
[6] Ex. 23.
[7] Exs. 20 and 22.
[8] Exs. 15-16.
[9] Ex. 14.
[10] Ex. 13.

c. submit monthly attendance sheets to the County;

d. obtain six hours of additional training by February 16, 2007, pre-approved by the County, above the existing training requirements; and

e. document that the parents of her daycare children have been shown the Settlement Agreement.[11]

8. On March 29, 2007, Johnson and Tim Hennessey, Quality Assurance Specialist for the County, conducted an inspection of the Licensee's daycare. The Licensee admitted them to the premises. The Licensee indicated that she had 9 children in care. Johnson observed that the Licensee had 11 children (1 infant, 1 toddler, and 9 preschoolers) in her daycare.[12] Since 11 children under school age were in her care, the Licensee was one child over her licensed capacity that day. The Licensee indicated that she had taken in another child from a daycare provider who was ill.[13]

9. While on the premises, Johnson and Hennessey noted that three doll carriers were stored in front of an egress window from the lower level. The doll carriers were too small to prevent access to the window for purposes of egress.[14] The inspectors informed the Licensee that storing objects in the egress window was prohibited. A correction order was written to document the violations and obtain compliance.[15]

10. On April 4, 2007. Johnson and Rita Strouth, another County inspector, conducted a relicensing inspection of the Licensee's daycare. The Licensee was within her capacity limits. The inspectors noted the following, identified as violations:

a. no grievance policy on record;

b. no monthly crib safety checks performed;

c. no alcohol/drug policy signed or discussed with parents;

d. two children missing medical or dental information;

e. a toddler accessed the furnace room by following the Licensee and the inspector in through the door;

f. a gate across the basement stairs was not in place when a toddler was in care;

g. a door to the upstairs bathroom was not locked and toxic substances were unsecured inside; and

[11] Ex. 12.
[12] Testimony of Johnson.
[13] Testimony of Licensee.
[14] The items are depicted in Ex. 30.
[15] Ex. 10.

h. Shaken Baby Syndrome & Sudden Infant Death Syndrome training class needed to be taken and a shaken baby prevention video needed to be viewed.[16]

11. Johnson prepared a draft correction order to the Licensee with respect to violations noted during the inspection on April 4, 2007. Due to the conditional license status of the Licensee, the correction order was not issued by Johnson.[17]

12. The Licensee maintained that no grievance policy was needed since she was the only person responsible for the day care. The toddler accessing the furnace room was explained as the inspectors not closing the door behind them as they entered that room. Had the door been closed, the toddler would have been outside of any adult's sight or hearing, which would have been a violation of the supervision standard. Two adults were present in the room with the toddler.

13. At the hearing, the Licensee presented certificates from training courses that indicated she had completed 15 hours of training from January 26, 2006 to November 14, 2006.[18] One hour of that training was completed through an online, self-directed course. She completed two additional hours of training specific to Shaken Baby Syndrome & Reducing the Risk of Sudden Infant Death Syndrome on May 1 and May 3, 2007.[19] The first hour of that training was completed through an online course. A contact (in-person) course was completed on May 3, 2007 on Shaken Baby Syndrome & Reducing the Risk of Sudden Infant Death Syndrome.[20]

14. The County informed the Licensee by letter on April 12, 2007, that the County was recommending revocation of her family child care license due to the violations of the Settlement Agreement and observed rule violations on March 29 and April 4, 2007.[21]

15. Hennessey and another inspector went unannounced to the side door of the Licensee's daycare on May 23, 2007, at approximately 10:00 a.m. The inspectors heard the voices of children from the inside of the house as they approached the premises. Soon after Hennessey knocked on the side door, the voices went silent. No one answered the door. Hennessey went to the back gate and neither saw nor heard anyone in the back yard. Photographs of the back yard suggest that the yard is not large enough to prevent someone from hearing the investigators. The other inspector knocked loudly and rang the doorbell. Hennessey telephoned the Licensee. The telephone was heard ringing from inside the home. No one answered and Hennessey left a voicemail message. No one answered the door and the investigators left.[22]

[16] Ex. 9.
[17] Testimony of Johnson.
[18] Ex. 38.
[19] Exs. 39-40.
[20] Ex. 39.
[21] Ex. 7.
[22] Testimony of Hennessey; Exs. 3-4.

16. The refusal of access raised concerns with Hennessey about the Licensee's daycare. He contacted the Department and he was told that the existing revocation proceeding would be expedited to address the situation.[23]

17. By letter dated April 30, 2007, the County informed the Department of Human Services that it was recommending revocation of the Licensee's family child care license. The County provided the license holder's relevant recent history to the DHS in conjunction with the recommendation. The information provided to DHS included the County's 2006 recommendation for revocation, the July 20, 2006 Order for Revocation, the Licensee's appeal, and the Settlement Agreement resolving that matter. The County cited as reasons for revocation the capacity violation on March 29, 2007 (and providing false information about the number of children in care), the results of the April 4, 2007 visit, failure to submit monthly attendance sheets, failure to complete required training by February 16, 2007, failure to document that daycare parents have had the opportunity to review the Settlement Agreement, and providing false information regarding operation of her daycare on the week of April 2, 2007.[24]

18. By Order dated May 25, 2007, the DHS notified the Licensee that it was revoking her license to provide child care based on findings that she had violated the terms of the Settlement Agreement by failing to allow access to the daycare premises on May 23, 2007; failing to operate within the C2 ratio and capacity limits (by having 11 children under school age in care at the same time); failing to provide monthly attendance sheets; and failing to comply with the rules regarding documentation, training, and exposing children in care to hazards as listed in the April 4, 2007 visit. The Reinstatement of Order of Revocation informed the Licensee of her right to appeal and seek a contested case hearing.[25] The Licensee appealed the Order, resulting in the initiation of the present contested case hearing.

19. The Department issued the Notice of and Order for Hearing in this matter on May 13, 2007. Exhibit A, attached to that document, did not independently state any basis for the revocation, but incorporated by reference the May 25, 2007 Reinstatement of Order of Revocation. That document alleged violations of Minn. Stat. §§ 245A.04, 245A.06, 245A.144, 245A.1445, and 245A.146, Minn. R. 9502.0325, Minn. R. 9502.0335, Minn. R. 9502.0365, subpart 1, Minn. R. 9502.0367, subpart C(2), Minn. R. 9502.0405, subpart 4, Minn. R. 9502.0425, subparts 4, 7, and 10, and Minn. R. 9502.0435, subparts 4 and 6.

[23] Ex. 3.
[24] Ex. 5. Hennessey maintained that the Licensee has told him that she would not be operating her daycare that week.
[25] Ex. 1.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have authority to consider and rule on the issues in this contested case proceeding pursuant to Minn. Stat. §§ 14.50 and 245A.08.[26]

2. The Notice of and Order for Hearing was proper in all respects, and the County and DHS have complied with all procedural requirements.

3. The Commissioner is authorized by state statute to "suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules" or "knowingly withholds relevant information from or gives false or misleading information to the commissioner in connection with an application for a license . . . or during an investigation."[27] The statute further provides that, "[w]hen applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."[28]

4. At a hearing regarding a licensing sanction, the Commissioner has the burden of proof to demonstrate that reasonable cause existed for the adverse action taken against the Licensee's family child care license. The Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the Licensee failed to comply fully with applicable law or rule. When such a showing is made, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that she is in full compliance with the laws and rules that the Commissioner alleges were violated at the time the alleged violations occurred.[29]

5. The Commissioner has demonstrated reasonable cause for action against the Licensee by showing that she failed to maintain appropriate records for children in her care in violation of Minn. R. 9502.0405, subp. 4. These failures include the lack of grievance policy, the lack of medical and dental records for two daycare children, and failing to document monthly crib inspections. The burden has shifted to the Licensee to demonstrate by a preponderance of the evidence that she complied fully with the statutes and rules governing her daycare. The Licensee has failed to demonstrate compliance with that rule.

6. Licensing rules limit the total number of children and the number of preschoolers, toddlers, and infants who may be in care at any one time. A person who holds a Group Family Day Care C2 License may have up to twelve children in care. Of those twelve, the maximum number of children under school age who may be in care is ten. Of those ten children under school age, a total of two may be infants and toddlers.

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[26] Unless otherwise noted, all references to Minnesota Statutes are to the 2006 edition and all references to Minnesota Rules are to the 2005 edition.
[27] Minn. Stat. § 245A.07, subd. 3.
[28] Minn. Stat. § 245A.07, subd. 1.
[29] Minn. Stat. § 245A.08, subd. 3.

Of those two, only one may be an infant.[30] The statute defines "infants" as children who are at least six weeks old but less than 12 months of age,[31] and "toddlers," for Group Family Day Care purposes, as children who are at least 12 months old but less than 30 months old.[32] The Commissioner has demonstrated reasonable cause for adverse action against the Licensee's license by showing that the Licensee exceeded the total number of children permitted under her license on at least one occasion in March 2007. The Licensee has failed to prove by a preponderance of the evidence that she complied fully with the relevant licensing statutes and rules.

7. Licensing rules establish certain requirements for premises and equipment that are used for providing child care.[33] The Commissioner has not demonstrated reasonable cause for adverse action against the Licensee's license by showing that doll carriers were placed in the sill of an egress window. The Licensee has demonstrated by a preponderance of the evidence that she complied fully with that licensing rule.

8. Licensing rules require that the "furnace, hot water heater, and workshop area must be inaccessible to children."[34] The Commissioner has not demonstrated reasonable cause for adverse action against the Licensee's license by showing that a toddler could follow the Licensee and an inspector into the furnace room while retrieving records for the inspection. Having two adults present was sufficient protection for the toddler, particularly since to close the door would violate the supervision standard required for toddlers.[35] The Licensee has demonstrated full compliance with this standard.

9. Licensing rules require that hazardous substances be stored in areas "inaccessible to children."[36] The Commissioner has demonstrated reasonable cause for adverse action against the Licensee's license by showing that the upstairs bathroom was accessible to daycare children and that this room contained toxic substances not rendered inaccessible. The Licensee has failed to prove by a preponderance of the evidence that she complied fully with this standard.

10. Licensing rules require that providers must allow access to the daycare premises during normal hours.[37] The Commissioner has demonstrated reasonable cause for adverse action against the Licensee's license by showing that inspectors were denied access to the premises during normal daycare hours on May 23, 2007, when children were present. The Licensee has failed to prove by a preponderance of the evidence that she complied fully with this standard.

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[30] Minn. R. 9502.0365, subp. 1, and 9502.0367 C.2.
[31] Minn. Stat. § 245A.02, subd. 19(c).
[32] Minn. Stat. § 245A.02, subd. 19(d).
[33] Minn. R. 9502.0425.
[34] Minn. R. 9502.0425, subp. 7.
[35] Minn. R. 9502.0315, subp. 29a ("sight or hearing" required).
[36] Minn. R. 9502.0435, subp. 4.
[37] Minn. R. 9502.0335, subp. 13.

11. Minn. Rule 9502.0385 required that providers obtain annual training relating to the provision of daycare.[38] The Settlement Agreement required the Licensee to obtain 6 hours of additional training on topics pre-approved by the County. This training was to be obtained by February 16, 2007. The Commissioner has not demonstrated reasonable cause for adverse action against the Licensee's license since the Licensee has shown that she completed the training required under the now-repealed rule. Further, the Commissioner has not demonstrated a violation of the Settlement Agreement by the Licensee's failure to obtain pre-approval of the training that she has taken. The Settlement Agreement was insufficiently clear regarding the processes for approval or reporting to support a conclusion that the Licensee violated that portion of the agreement regarding completion of training.

12. The Memorandum that follows explains the reasons for these Conclusions, and that Memorandum is incorporated into these Conclusions.

Based on the Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that adverse action be taken against Dawn Mundahl's license to provide child care. It is appropriate that her day care license be revoked as provided for in the Settlement Agreement.

Dated: October 10, 2007

_/s/ Richard C. Luis_____
RICHARD C. LUIS
Administrative Law Judge

Reported: Tape Recorded (four tapes); No Transcript Prepared.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party

[38] Minn. R. 9502.0385. The rule was repealed in the 2007 Legislative session, after the events forming the basis of the adverse action. Minn. Laws 2007, Chapter 112, Sec. 59.

adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Appeals and Regulations Division, P.O. Box 64941, St. Paul, MN 55164-0941, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota law, the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The Licensee maintained that any noncompliance with the Settlement Agreement arose due to misunderstandings between the County and the Licensee. She also asserts that the County has an obligation to inform the Licensee of noncompliance, particularly regarding monthly attendance forms and approval of courses for the additional required training. The terms of the Settlement Agreement are sufficiently clear to put the Licensee on notice that she had an affirmative obligation to meet those requirements. Any of any of the particular requirements could have been discussed with the County inspectors.

The Licensee has shown that she had met the now-repealed rule on training. While the Department asserted that the Licensee failed to report the training she had taken, there is no mechanism, outside of the relicensure process, for the Licensee to report her attendance. Her conclusion, that the training should be reported then, is a reasonable one under the circumstances. Regarding the video viewing, the statutory provision requiring that child care providers view a video presentation on the dangers associated with shaking infants and young children does not have any particular enforcement provision and appears to be tied to the training requirement that was repealed in 2007.[39] The one hour training requirement on shaken baby and sudden infant death syndromes is required to be taken once in a five-year period. The training in the statute was expressly tied to Minn. Rule 9502.0385, now repealed. The evidence does not show that the Licensee violated that provision.

Minn. Stat. § 245A.08, subd. 3(a), specifies that, once the Commissioner demonstrates reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable laws or rules, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that he or she was in full compliance

[39] The video is entitled *Reducing the Risk of Shaken Baby Syndrome*. The statutory language is located at Minn. Stat. § 245A.1445.

with the laws and rules alleged to have been violated. As set forth in the Findings above, the Department has demonstrated that the Licensee committed several violations of the licensing rules and statutes, and the Licensee did not bear her burden to show that she was in full compliance with those rules and statutes. The two most serious violations occurred when the Licensee cared for more children under school age than allowed and when she failed to provide access as required under the rules and reiterated in the Settlement Agreement.

Child care providers must comply with the capacity limits associated with their licensure in order to protect the health, safety, and welfare of the children in their homes. The Licensee maintained she was assisting another provider who was ill by taking in two of that provider's enrollment. The reason offered by the Licensee does not excuse the noncompliance. The Licensee's failure to comply with the capacity limit on March 29, 2007, supports taking adverse action against the Licensee. This conduct also violates an express term in the Settlement Agreement, further supporting adverse action.

The evidence in this record demonstrates that the Licensee's violations are chronic. The existence of a prior revocation on the same basis, resolved by a Settlement Agreement, is sufficient proof of chronicity to support more serious sanctions.[40]

Another serious violation is the Licensee's failure to provide access on May 23, 2007. The explanation provided by the Licensee conflicts with the description of events by the licensing inspectors and is not credible. Had the Licensee and the daycare children been in a non-visible part of the backyard and not talking (as she claimed), the Licensee most likely would have heard the loud knocking, doorbell ringing, and the telephone call that went to voicemail. The inspectors heard children's voices coming from inside the house, which stopped when they knocked on the door. The sequence of events, described credibly by Mr. Hennessey, is consistent with a deliberate refusal to provide access (if the Licensee was present), or a failure to supervise children (if she was absent). Whether the Licensee was present or not, the conduct constitutes a violation of the rules and statutes governing licensed daycare, a violation of the Settlement Agreement, and sufficient cause to support revocation of the Licensee's child care license. Similar problems have been documented in compliance with the access obligation, establishing the chronicity of the Licensee's violations in this area.

The Minnesota Court of Appeals has set out the standard to be met in a license revocation action by the Department as follows:

> This court has determined that the severity of an administrative sanction must reflect the seriousness of the violation. Revocation of a real estate broker's license for improperly withdrawing earnest money from a trust account was deemed too drastic a sanction in *In re License of Haugen*, 278 N.W.2d at 81. Similarly, in *In re Licenses of Kane*, this court reversed an insurance license revocation for misrepresentations to senior

[40] Minn. Stat. § 245A.07, subd. 1.

> citizens finding that revocation exceeded the action necessary to protect the public and to deter such conduct in the future. 473 N.W.2d at 878. While licensing and monitoring of childcare facilities is unique and requires heightened scrutiny to protect a vulnerable segment of our population prone to harm and injury, we conclude that the statute and rules provide the guidelines necessary to provide balance to protect the license holder as well. As in *Kane* and *Haugen*, the commissioner's choice of sanction must not exceed the seriousness of the violation and must be supported by the record.[41]

Applying the standards set out in *Burke*, the Department has shown that the capacity and access violations are sufficiently serious and chronic in nature to warrant revocation. A lesser sanction, imposition of a conditional license, was attempted and the Licensee failed to conduct her daycare in compliance with the applicable statutes and rules. Revocation is an appropriate sanction for the demonstrated violations.

R.C.L.

[41] *In Re Burke*, 666 N.W.2d 724, 728 (Minn. App. 2003).